'It Is Refuted by the Constitution'

U.S. District Judge Charles R. Richey yesterday ruled that presidential documents and tape recordings of the Nixon administration are not the personal property of Richard M. Nixon but belong to the government. Here are excerpts from the 70-page opinion.

In order to sustain the assertion that former President Nixon personally owns the documents, papers, tapes and other materials generated or retained by himself or others in the performance of his duties as the President of the United States, it must be found that an individual President is distinguishable from other public servants. Such a conclusion, however, is untenable as it is refuted by the Constitution and the very concept of the office of the President.

Art. II, Sec. 1, cl. 1 of the Constitution provides that: "The Executive power shall be vested in a President of the United States of America. He shall hold his office during the Term of four years, and together with the Vice President, chosen for the same Term, be elected as follows: . . ." And, Sec. I, cl. 5 further provides that:

> In Case of the Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President or Vice President, Declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President elected.

These sections of Article II compel only one conclusion: the powers and duties of the executive inure to the office and not to any individual office-holder; for the President, although elected to the highest office in the nation, is but a transient holder of the public trust. Even though a President while in office may exercise specific and enumerated powers . . . he is nevertheless a servant of the people. The President is elected by the people (Art. II, Sec. I, cl. 1), to execute the laws made by the people (Art. II, Sec. I, cl. 7), and may be removed by the people (Art. I, Sec. IV); and, as recently articulated by the U.S. Court of Appeals for the District of Columbia:

> Though the President is elected by a nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands . . . Sovereignty remains at all times with the people. . . .

Former President Nixon's claim of ownership is therefore repugnant to the very nature of the office of the President.

It is important to remember that the original Articles of Confederation did not include a chief executive, and that there was a great reluctancy in formulating the Constitution to include such an office because of the fear that it would lead to a monarchial rather than a republican form of government. The framers of the Constitution, however, were successful in establishing such an office by convincing the people that a President was necessary for the proper administration of the government and that he would be in the nature of a chief magistrate and not a monarch. James Madison argued in *The Federalist No. 69* that:

> The President of the United States would be an Officer elected by the people for four years, the King of Great Britain is a perpetual and hereditary prince. . . . What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

Thus, as the Supreme Court has cautioned, "it would be altogether unsafe to reason from any supposed resemblance between [the President and a monarch] where the rights and powers of the executive are brought into question." . . . Rather, the President is a "creature of the Law." . . . And, in order to preserve the freedom of the people, the President is bound by the law. . . . Therefore, to uphold former President Nixon's claim of ownership would be to place him above the law as well as recognize that he may assert a right to the products of the office, which would be to compare him to a monarch. This the court cannot do.

Further, not only must President Nixon's claim of ownership be rejected as contrary to the nature of the office, but also because it is expressly negated by the Constitution itself. Art. II, Sec. I, cl. 6, generally known as the Emoluments Clause, provides that: "The President shall, at stated Times, receive for his Services, a Compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." Since the materials in question are directly related to the performance of the office of the President and are of incalculable value, it would be contradictory to and a violation of, the Emoluments clause for a President to be given or to be permitted to assert a personal right to such materials.

Moreover, it was the intent of the framers of the Constitution to prevent the office of the President from being a position of both power and profit. While they recognized that they could not divest the office of power, they sought to prevent the corruption of the office by removing profit. They feared that if the office offered both power and profit, the persons who sought the office would "not be the wise and moderate, the lovers of peace and good order, the men fittest for trust." . . .